GOLDEN VALLEY ELECTRIC ASSOCIATION

IBLA 86-217 Decided December 31, 1987

Appeal from decisions of the Alaska State Office, Bureau of Land Management, declaring transmission line rights-of-way null and void in part. F-026132 and F-031898.

Reversed.

1. Alaska: Statehood Act--Alaska National Interest Lands Conservation Act: State Selections--Alaska National Interest Lands Conservation Act: Valid Existing Rights--Rights-of-Way: Act of March 4, 1911--Rights-of-Way: Cancellation--State Selections

Conveyance of lands to the State of Alaska pursuant to a State selection by tentative approval or patent subsequent to issuance of a right-of-way grant across lands selected is subject to the pre-existing right-of-way. A decision declaring the right-of-way null and void will be reversed notwithstanding the failure of the tentative approval or patent to refer to the right-of-way.

APPEARANCES: David H. Call, Esq., Fairbanks, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Golden Valley Electric Association (Golden Valley) has filed a notice of appeal from two decisions of the Fairbanks, Alaska, District Office, Bureau of Land Management (BLM), dated November 22, 1985, to the extent they purported to declare a portion of appellant's transmission line rights-of-way, F-026132 and F-031898, null and void.

The first decision concerning right-of-way F-026132 recited that appellant's right-of-way for electric transmission line was issued August 22, 1961, pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1982) (repealed by Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, § 706(a), 90 Stat. 2743, 2793). The decision further stated that certain lands traversed by the right-of-way were tentatively approved to the State of Alaska on January 17, 1974, pursuant to State selection F-028921 and certain other lands crossed by the right-of-way were patented to the State on

October 18, 1962, pursuant to State selection F-027697. BLM held that since the "TA [tentative approval] and patent were issued to the State of Alaska without reserving or making them subject to the right-of-way," the part of the right-of-way which traverses the tentatively approved tract and the patented tract is "declared null and void." 1/ The decision further held that certain other State selections which were tentatively approved or patented subsequent to approval of appellant's right-of-way were "subject to the right-of-way grant," but noted that pursuant to section 906(l)(2) of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), 43 U.S.C. § 1601 note (1982), the State succeeded to the interests of the United States as grantor of the right-of-way.

The second BLM decision recited that right-of-way F-031898 was issued to appellant on September 1, 1964, pursuant to the Act of March 4, 1911. The BLM decision further noted that on November 30, 1964, the W 1/2 and the W 1/2 E 1/2 of sec. 35, T. 1 N., R. 1 W., Fairbanks Meridian, were conveyed to the State of Alaska in a quitclaim deed, and that there was no mention of the right-of-way in the conveyance document. The decision further stated: "Because all interests in the lands were conveyed to the State at that time the United States no longer has management authority of the right-of-way [in the patented lands] and the grant is hereby declared null and void in part." BLM cited no additional authority for declaring the right-of-way null and void to the extent it crossed the patented lands.

In its statement of reasons on appeal, appellant contends that it is of no legal consequence that the instrument of conveyance (patent or tentative approval) from the United States to the State of Alaska omits reference to appellant's previously approved rights-of-way. Appellant asserts the rights-of-way granted to it were legally effective on the date of approval and the later conveyances to the State of Alaska without specific mention of the rights-of-way did not render the rights-of-way null and void.

The limited issue presented is whether BLM's action declaring appellant's rights-of-way null and void to the extent they embraced land later conveyed to the State was proper.

[1] As a general rule, a valid deed can only be effective to convey such estate as the grantor has, regardless of whether it purports to convey a larger estate. Thus, a deed cannot operate to convey an interest in the land which the grantor does not have. 23 Am. Jur. 2d, Deeds § 336 (1983). Hence, it would follow that the conveyance to the State, either by tentative approval or patent, would ordinarily be subject to the previously granted right-of-way. Reference to relevant statutory authority supports the application of this principle to the present case. Section 906(c)(1) of ANILCA, provides that:

1/ The BLM decision also declared the right-of-way null and void to the extent it crossed certain homestead entries which predated issuance of the right-of-way and certain tracts previously patented. Appellant has not challenged this part of the decision on appeal and, hence, this part of the decision must now be deemed final.

> All tentative approvals of State of Alaska land selections pursuant to the Alaska Statehood Act are hereby confirmed, subject only to valid existing rights and * * * all rights, title, and interest of the United States in and to such lands is deemed to have vested in the State of Alaska as of the date of tentative approval * * *.

Further, section 906(l)(2) dealing with existing rights specifically provides that "Where, prior to a conveyance to the State, a * * * right-of-way * * * has been issued for the lands, the conveyance shall contain provisions making it subject to the * * * right-of-way * * * granted * * *." Section 906(1)(2) also provides that upon issuance of tentative approval, "the State shall succeed and become entitled to any and all interests of the United States as * * * grantor * * * in any such * * * rights-of-way * * *." Thus, we find nothing in the provisions of ANILCA which would support a finding that rights-of-way granted prior to tentative approval or patent of the lands are properly held null and void. Rather, the State selection is subject to these valid existing rights. See State of Alaska v. Thorson, 83 IBLA 237, 91 I.D. 331 (1984). There is further support for this conclusion in the regulations governing rights-of-way. Regulations in effect at the time appellant's rights-of-way were issued provided:

> The final disposal by the United States of any tract traversed by a right-of-way shall not be construed to be a revocation of the right-of-way in whole or part, but such final disposition shall be deemed and taken to be subject to such right-of-way until it is specifically canceled.

43 CFR 2234.1-5(b)(2) (1964).

Current statutory authority and regulations governing the effect of conveyance of land out of Federal ownership upon rights-of-way previously granted across such lands are of similar import. See FLPMA, section 508, 43 U.S.C. § 1768 (1982); 43 CFR 2803.5(b).

A distinction is properly drawn between waiver of administration of the right-of-way grant upon conveyance of the fee interest, on the one hand, and declaring the right-of-way null and void, on the other hand. See section 906(l)(4) of ANILCA, 43 U.S.C. § 1601 note (1982). Thus, in examining a waiver of administration of a right-of-way across lands conveyed under ANCSA subject to valid existing rights including outstanding rights-of-way, the Board found that a waiver of administration did not impair or diminish the legal rights of the holder of the right-of-way across the conveyed lands. State of Alaska, 97 IBLA 229, 232 (1987); State of Alaska, 86 IBLA 268, 272 (1985). Such is not the case with respect to a decision declaring a right-of-way null and void.

The rights-of-way at issue in this appeal, which issued prior to tentative approval or patent of the lands in the conflicting State selections, are properly distinguished from rights-of-way issued subsequent to tentative approval of a State selection. See Northwest Alaskan Pipeline Co., 99 IBLA 201 (1987).

Accordingly, we conclude the decisions of BLM must be reversed to the extent they purported to declare appellant's rights-of-way null and void for lands subsequently conveyed to the State of Alaska.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are reversed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

James L. Burski
Administrative Judge

R. W. Mullen
Administrative Judge